

1 The victim called her father at home and informed him that defendant
2 was still angry. The victim told everyone that her father was coming back to
3 the party. The victim's father returned to put everyone at ease and explained
4 to defendant that he was not being disrespectful, and that defendant should not
5 be upset. Defendant began to yell at the victim's father and turned over a table.
6 As the victim's father exited the apartment again, defendant could be heard
7 inside the apartment yelling to be let out.

8 The victim, who remained inside the apartment with defendant, told him
9 to calm down. Defendant shoved the victim, causing her to scream. The
10 victim's father heard the victim scream while he was outside and went back to
11 defendant's apartment. Defendant walked outside the apartment, whereupon
12 a fight broke out between defendant and the victim's father.

13 During the fight outside, defendant slashed the victim's father's face
14 with a knife. The victim's father then swung a stepladder and struck defendant.
15 The victim's father ran into the apartment, with defendant in pursuit with the
16 knife. Defendant pursued the victim's father into the kitchen, where he
17 continued to stab at the victim's father.

18 The victim got between defendant and her father, yelling for defendant
19 to stop. As she stood between them, defendant continued to swing the knife.
20 Defendant cut the victim's arm and hand as she tried to protect her father.
21 Defendant concedes that he cut the victim when she attempted to protect her
22 father. Defendant continued to stab at the victim's father, and yelled "I'm
23 going to kill you." The police arrived shortly thereafter. Witnesses told police
24 that defendant stabbed the victim and her father. The victim's father never
25 possessed a knife during the fight, and defendant sustained no injuries.

26 Defendant was charged with aggravated assault of the victim's father,
27 the victim, and the victim's sister. At trial, defendant's primary defense was
28 that the victim's father was the aggressor, and that all of defendant's actions
29 were justified use of force pursuant to Arizona Revised Statute ("A.R.S.")
30 section 13-411. Defendant further claimed that he injured the victim only
31 because she negligently interfered with his attempts to defend himself.
32 Ultimately, the jury hung on the count regarding the victim's father, and
33 acquitted defendant regarding the other sister. The jury convicted defendant
34 on Count 2 for the aggravated assault of the victim.

(Doc. #15, Exh H, memorandum decision at 1-3).

35 On direct review, Ross raised three issues of trial court error: 1) the failure to instruct
36 the jury that the victim's alleged negligence could relieve Ross of any criminal liability; and
37 the failure to define "innocent bystander" as it related to the justification defense instruction
38 given to the jury; 2) insufficient evidence to support the conviction for aggravated assault;
39 and 3) the denial of his new trial motion based upon the trial court's refusal to let the jury
40 consider the victim's negligence. Following the court of appeals' memorandum decision

1 affirming his conviction and sentence, Ross filed a petition for post-conviction relief, raising
2 the following issues:

3 1. The jury instruction on unavailability of the justification defense for injuries
4 to an innocent bystander shifted the burden to Ross to prove beyond a reasonable doubt that
5 the victim was not an innocent bystander;

6 2. The prosecutor engaged in misconduct by requesting the above instruction;

7 3. The trial court erred by denying Ross' motion for acquittal;

8 4. There was insufficient evidence to support the conviction;

9 5. The trial court erred by finding Ross' release status as an aggravating factor at
10 sentencing, as well as the aggravating and mitigating factors used for sentencing;

11 6. Trial counsel was ineffective for failing to properly research justification law;
12 failing to state Ross' defense in the opening statement, closing argument and motion for a
13 new trial; failing to adequately argue the motion for acquittal; failing to object to an improper
14 instruction; and failing to present Ross' "true" defense;

15 7. There was an alleged conflict in counsel's defense, as opposed to Ross' "true
16 defense";

17 8. The errors amounted to plain error in violation of the Federal Rules of Criminal
18 Procedure;

19 9. Appellate counsel was ineffective because he did not raise Ross' theory of the
20 case;

21 10. There was cumulative error; and

22 11. A request "that this court hold an evidentiary hearing as stated concerning this
23 claim."

24 (Doc. #11, Exh F).

25 All claims aside from the ineffective assistance claims were summarily denied
26 because the court found they could have been raised on direct appeal (*Id.*, Exh G).
27 Regarding his claims of ineffective assistance, the trial court ruled as follows:

Petitioner fails to set forth a colorable claim for ineffective assistance of trial or appellate counsel. His trial counsel did not fail to argue his defenses. The issue of whether Trinity Stelter was an innocent bystander was raised by counsel at trial and on appeal. The Court instructed the jury on this issue.

The Court of Appeals has already ruled that the jury was not erroneously instructed on the law. Therefore, trial and appellate counsel did not fail to appropriately represent this Defendant.

(*Id.*, Exh G).

The court of appeals denied review (*Id.*, Exh I). In his federal petition, Ross reurges the claims raised in his Rule 32 petition.

PROCEDURAL DEFAULT

A state prisoner must exhaust his state remedies before petitioning for a writ of habeas corpus in federal court. 28 U.S.C. § 2254(b)(1) & (c); *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995); *McQueary v. Blodgett*, 924 F.2d 829, 833 (9th Cir. 1991). To properly exhaust state remedies, a petitioner must fairly present his claims to the state's highest court in a procedurally appropriate manner. *O'Sullivan v. Boerckel*, 526 U.S. 838, 839-846 (1999). In Arizona, a petitioner must fairly present his claims to the Arizona Court of Appeals by properly pursuing them through the state's direct appeal process or through appropriate post-conviction relief. *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). A claim has been fairly presented if the petitioner has described both the operative facts and the federal legal theory on which the claim is based. *Bland v. Cal. Dep't of Corrections*, 20 F.3d 1469, 1472-73 (9th Cir.1994), *overruled on other grounds by Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000) (en banc); *Tamalini v. Stewart*, 249 F.3d 895, 898 -99 (9th Cir. 2001). The exhaustion requirement will not be met where the Petitioner fails to fairly present his claims. *Roettgen*, 33 F.3d at 38.

If a petition contains claims that were never fairly presented in state court, the federal court must determine whether state remedies remain available to the petitioner. *See Rose v. Lundy*, 455 U.S. 509, 519-20 (1982); *Harris v. Reed*, 489 U.S. 255, 268-270 (1989) (O'Connor, J., concurring). If remedies are available in state court, then the federal court

1 may dismiss the petition without prejudice pending the exhaustion of state remedies. *Id.*
2 However, if the court finds that the petitioner would have no state remedy were he to return
3 to the state court, then his claims are considered procedurally defaulted. *Teague v. Lane*, 489
4 U.S. 288, 298-99 (1989); *White v. Lewis*, 874 F.2d 599, 602-605 (9th Cir. 1989). The federal
5 court may decline to consider these claims unless the petitioner can demonstrate that a
6 miscarriage of justice would result, or establish cause for his noncompliance and actual
7 prejudice. *See Schlup v. Delo*, 513 U.S. 298, 321 (1995); *Coleman v. Thompson*, 501 U.S.
8 722, 750-51 (1991); *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986); *Wainwright v. Sykes*,
9 433 U.S. 72, 86 (1977); *United States v. Frady*, 456 U.S. 152, 167-68 (1982).

10 Further, a procedural default may occur when a Petitioner raises a claim in state court,
11 but the state court finds the claim to be defaulted on procedural grounds. *Coleman*, 501 U.S.
12 at 730-31. In such cases, federal habeas review is precluded if the state court opinion
13 contains a plain statement clearly and expressly relying on a procedural ground "that is both
14 'independent' of the merits of the federal claim and an 'adequate' basis for the court's
15 decision." *See Harris*, 489 U.S. at 260. A state procedural default ruling is "independent"
16 unless application of the bar depends on an antecedent ruling on the merits of the federal
17 claim. *See Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985); *Stewart v. Smith*, 536 U.S. 856
18 (2002). A state's application of the bar is "adequate" if it is "strictly or regularly followed."
19 *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (quoting *Hathorn v. Lovorn*, 457 U.S. 255,
20 262-63 (1982)). In cases in which a state prisoner has defaulted his federal claims in state
21 court pursuant to an independent and adequate state procedural rule, just as in cases
22 involving defaulted claims that were not fairly presented, federal habeas review of the claims
23 is barred unless the prisoner can demonstrate a miscarriage of justice or cause and actual
24 prejudice to excuse the default. *See Coleman*, 501 U.S. at 750-51.

25 DISCUSSION

26 The Court agrees with Respondents that Ross has procedurally defaulted all his
27 grounds except for the claims of ineffective assistance. Grounds I-V, VII, VIII, X and XI

1 were summarily denied when Ross argued them in the superior court because the court found
2 they could have been raised on direct appeal. In so ruling, the state court applied a
3 procedural bar, Rule 32.2(a) of the Arizona Rules of Criminal Procedure, which precludes
4 post-conviction relief based on claims that were either raisable or waived on direct review.
5 Ross is now time-barred from returning to state court for a review of such claims because his
6 claims do not fall within one of the exceptions under Rules 32.1(d)-(h) and 32.4(a). In
7 addition, this procedural bar is "both 'independent' of the merits of the federal claim and an
8 'adequate' basis for the court's decision." *See Harris*, 489 U.S. at 260.

9 Concerning Grounds VI and IX, his claims of ineffective assistance of both trial and
10 appellate counsel, Respondents contend that these have not been fairly presented to the state
11 court because, in requesting review of his post-conviction petition, Ross asserted "only a
12 generic argument that trial and appellate counsel were ineffective for failing to argue the
13 'correct defense'" (Doc. #15 at 8), and not the specific errors raised in his federal petition.
14 A review of the record indicates that Ross presented as issues for review to the court of
15 appeals whether both trial counsels and appellate counsel provided ineffective assistance in
16 violation of his constitutional rights (*Id.* Exh G).

17 Assuming *arguendo* that Ross sufficiently presented his ineffective assistance claims
18 to the court of appeals to fulfill the exhaustion requirement, they still fail. First, Ross'
19 underlying argument is that the state court did not properly instruct the jury on an element
20 of his defense, a matter of state law not reviewable in a habeas petition. *See Estelle v.*
21 *McGuire*, 502 U.S. 62, 67-68 (1991). Second, trial counsel's decision to argue justification
22 was a tactical one; a disagreement about trial tactics cannot form the basis for a claim of
23 ineffective assistance. *People of Territory of Guam v. Santos*, 741 F.2d 1167, 1169 (9th Cir.
24 1984). Finally, the state court concluded that "trial counsel did not fail to argue his defenses"
25 (Doc. #15, Exh F). In doing so, it necessarily found that counsel's performance was not
26 deficient, and that Ross suffered no prejudice. *See Strickland v. Washington*, 466 U.S. 668
27 (1984). Ross' claim with regard to appellate counsel fails for the same reasons.

1 **IT IS THEREFORE RECOMMENDED** that Michael Andre Ross' Petition for Writ
2 of Habeas Corpus be **DENIED** and **DISMISSED WITH PREJUDICE** (Doc. #1).

3 This recommendation is not an order that is immediately appealable to the Ninth
4 Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of
5 Appellate Procedure, should not be filed until entry of the district court's judgment. The
6 parties shall have ten days from the date of service of a copy of this recommendation within
7 which to file specific written objections with the Court. *See*, 28 U.S.C. § 636(b)(1); Rules
8 72, 6(a), 6(e), Federal Rules of Civil Procedure. Thereafter, the parties have ten days within
9 which to file a response to the objections. Failure timely to file objections to the Magistrate
10 Judge's Report and Recommendation may result in the acceptance of the Report and
11 Recommendation by the district court without further review. *See United States v. Reyna-*
12 *Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual
13 determinations of the Magistrate Judge will be considered a waiver of a party's right to
14 appellate review of the findings of fact in an order or judgment entered pursuant to the
15 Magistrate Judge's recommendation. *See* Rule 72, Federal Rules of Civil Procedure.

16 DATED this 24th day of April, 2006.

17
18
19
20
21
22
23
24
25
26
27
28



David K. Duncan
United States Magistrate Judge